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In The

Supreme Court of the United States

October Term, 1994

COALITION FOR FREE AND OPEN ELECTIONS; PROHIBITION PARTY; EARL F. DODGE, Prohibition Party Nominee for President of the United States; GEORGE OBMSBY, Prohibition Nominee for Vice-President of the United States; LUTHER KENNICUTT; WALTER KENNICUTT; HAZELLE KENNICUTT; AARON STRANGE; EILEEN SCHUMAKER; ROBERT M. BLAIR; MRS. ROBERT M. BLAIR; HYLDA SHILLINGTON; NEW ALLIANCE PARTY; LENORA B. FULANI, Nominee for the Nomination of the New Alliance Party for President of the United States; SOCIALIST PARTY USA; J. QUINN BRISBEN, Socialist Party Nominee for President of the United States; WILLIAM D. EDWARDS, Socialist Party Nominee for Vice-President of the United States; MARIA LUIKART; EVELYN POWELL; DARIN ROHRER; DAN BOGGS; ELIZABETH S. SARGENT; and MICHAEL GRIFFITH,

Petitioners,

v.

BETTY McELDERRY, Chairman of the Oklahoma State Election Board; MONA LAMBIRD, Vice-Chairman of the Oklahoma State Election Board; LANCE WARD, Secretary of the Oklahoma State Election Board; GEORGE KRUMME, Member of the Oklahoma State Election Board; and the OKLAHOMA STATE ELECTION BOARD,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

JAMES C. LINGER*
BUTLER & LINGER
1710 South Boston Avenue
Tulsa, Oklahoma 74119-4810
(918) 585-2797
Counsel for Petitioners
**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

60PP

QUESTIONS PRESENTED FOR REVIEW

Whether Oklahoma's ban on write-in voting in presidential elections constitutes a discriminatory regulation of presidential elections so as to make the law constitutionally infirm.

Whether requiring a declaration of candidacy for write-in candidates for President of the United States backed up with a slate of electors would allow write-in voting in the general presidential election in such a manner as to avoid expending funds to count ballots for fictitious candidates and/or electors or those unwilling or unqualified to serve.

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Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

The Petitioners respectfully request that a writ of certiorari issue to review the judgment and opinion entered in this case by the United States Court of Appeals for the Tenth Circuit on February 27, 1995.

OPINIONS BELOW

The February 27, 1995 opinion of the United States Court of Appeals for the Tenth Circuit is reported at 48 F.3d 493 (10th Cir. 1995), and is set forth in Appendix A to this Petition at 1a-20a. The decision and order of the United States District Court for the Western District of Oklahoma is unreported and is set forth in Appendix B to this Petition at 21a-33a.

JURISDICTION

The United States Court of Appeals for the Tenth Circuit entered an opinion in this case on February 27, 1995. No petition or suggestion for rehearing was submitted to the Court of Appeals. This petition for a writ of certiorari is taken from the February 27, 1995 opinion of the United States Court of Appeals for the Tenth Circuit pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The statute challenged by Petitioners is Oklahoma Statutes, Title 26, Section 7-127(1), based on the First and

Fourteenth Amendments to the United States Constitution and Title 42, United States Code, § 1983. The foregoing statutes and constitutional provisions are set forth below:

OKLA. STAT. tit. 26, § 7-127(1), subd. 1

The following rules shall govern the counting and recounting of votes:

1. If the name of any person is written on a ballot, said ballot shall not be counted for any office or question thereon;

U.S. CONST., AMEND. I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. CONST., AMEND. XIV, § 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subject, or causes to be subjected any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and law, shall be liable to the party injured in action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

This Petition seeks a review of the decision of the United States Court of Appeals for the Tenth Circuit on February 27, 1995, upholding Oklahoma Statute, title 26, § 7-127(1) to the extent that it bans write-in voting in the State of Oklahoma in presidential elections. *Coalition for Free & Open Elections v. McElderry,* 48 F.3d 493 (10th Cir. 1995) (Appendix A, 1a-20a).

The Petitioners are an unincorporated association of organizations and individuals formed to work for full and fair access to the electoral process, three minor political parties and their respective 1992 candidates for President and Vice-President of the United States, and a number of voters who wish to cast write-in votes in presidential elections in Oklahoma because of the inability of the three minor political parties (viz.: Prohibition, Socialist, and New Alliance) to obtain ballot status for their candidates. Petitioners filed suit on March 9, 1992, seeking a judgment declaring Title 26, Oklahoma Statutes, § 7-127(1) unconstitutional as it applied to the Petitioners

by banning write-in voting in presidential elections because it violated the First and Fourteenth Amendments of the United States Constitution and Title 42, United States Code, § 1983. The Petitioners also sought a permanent injunction against the Respondents, who are responsible for administering the Oklahoma election laws, prohibiting them from following and enforcing the provisions of OKLA. STAT. tit. 26, § 7-127(1) to the extent that it would prohibit write-in voting in Oklahoma in presidential elections.

Due to the short time before the 1992 presidential election and the great expense that would have been needed in order to implement a write-in program on short notice in the State of Oklahoma, the parties entered into a joint stipulation of facts and reached an agreement that the lawsuit would only apply to future presidential elections.

After both sides filed a Motion for Summary Judgment, the Trial Court ruled on the Summary Judgment Motions, in an Order on March 26, 1993 (Appendix B, 21a – 33a), that Oklahoma's presidential ban on write-in voting was constitutional. The Trial Court concluded that the State of Oklahoma's interests advanced as justification for the write-in voting ban in presidential elections outweighed any slight or illusory injury to the constitutional rights which the Petitioners sought to vindicate. Therefore, the Trial Court concluded that Oklahoma statutory prohibition on write-in voting under OKLA. STAT. tit. 26, § 7-127(1), as applied to presidential elections, was constitutional under the First and Fourteenth Amendments to the United States Constitution because of adequate ballot

access afforded under other applicable Oklahoma elections laws, namely: OKLA. STAT. tit. 26, §§ 1-108(2), 10-101(1), 10-101.1(1), and 10-101.2(1).

On appeal to the United States Court of Appeals for the Tenth Circuit, Petitioners argued that the early filing deadline for ballot access petitions for presidential candidates in Oklahoma (i.e., July 15) made Oklahoma's regular presidential ballot access suspect under the Supreme Court's decision in *Anderson v. Celebrezze*, 460 U.S. 780 (1983), that the Trial Court had failed to consider the early, constitutionally suspect filing deadline coupled with a heavy petition signature requirement for presidential candidates when deciding Oklahoma's ban on write-in voting for President, as well as misinterpreting the breadth of this Court's decision in *Burdick v. Takushi*, 504 U.S. ___, 119 L.Ed.2d 245, 112 S.Ct. 2059 (1992).

While the Tenth Circuit acknowledged in its decision that Oklahoma's interest in banning write-in votes was less in a presidential election than in a state election and that the votes cast in each state in a presidential election impacted votes cast in other states, the Court of Appeals still upheld Oklahoma's right to ban write-in voting in presidential elections because the interests of voters for minor political parties in casting write-in votes was constitutionally insufficient. *Coalition for Free & Open Elections v. McElderry, supra,* (Appendix A, 1a – 20a).

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals below is in conflict with the decision of this Court in *Anderson v.*

Celebrezze to the extent that Oklahoma's ban on write-in voting impacts presidential elections. The decision of the Tenth Circuit in question has decided an important question of constitutional law which has not been, but should be, settled by this Court – i.e., whether and to what extent states may ban write-in voting in presidential elections. This Court's prior decision in *Burdick v. Takushi* does not directly address whether a write-in voting ban on presidential elections would constitute an impermissible discrimination under the teaching of this Court in *Anderson v. Celebrezze.*

I. OKLAHOMA'S BAN ON WRITE-IN VOTING IN PRESIDENTIAL ELECTIONS CONSTITUTES A DISCRIMINATORY REGULATION OF PRESIDENTIAL ELECTIONS SO AS TO MAKE THE LAW CONSTITUTIONALLY INFIRM

The Supreme Court's decision in *Burdick v. Takushi* is distinguishable and non-controlling in the case at bar because it does not address the stricter standard imposed on election laws which affect votes cast at presidential elections as required by this Court's ruling in *Anderson v. Celebrezze.* The majority in *Burdick* characterized ballot access in Hawaii for state candidates as "easy". *Burdick v. Takushi, supra,* 119 L.Ed.2d 245, at 255.

In stark contrast to Hawaii's law discussed in *Burdick,* Oklahoma requires signatures of registered voters equal to 3% of the total vote cast in the last general election in order to have the names of independent or minor party candidates for President and Vice-President to appear on the Oklahoma ballot. OKLA. STAT. tit. 26,

§§ 10-101.1 and 10-101.2. Therefore, not only does Oklahoma not have the easy ballot access which Hawaii has, but the fact that this Court in *Burdick v. Takushi* did not consider the write-in voting ban as it relates specifically to a presidential election is a crucial distinction in light of the *Burdick* decision's endorsement of the standard of review set forth in its previous decision in *Anderson v. Celebrezze.*

In fact, it is of great significance that this Court in *Burdick* does distinguish its case from the analysis of a presidential campaign as considered in *Anderson v. Celebrezze. Burdick v. Takushi, supra,* at 255, n. 5. As this Court said in the *Anderson* decision: " . . . the state has a less important interest in regulating Presidential elections than statewide or local elections, because the outcome of the former will be largely determined by voters beyond the state's boundaries." *Anderson v. Celebrezze, supra,* at 795. As this Court explained more fully:

> Furthermore, in the context of a Presidential election, State imposed restrictions implicate a uniquely important national interest. For the President and a Vice-President of the United States are the only elected officials who represent all the voters in the Nation. Moreover, the impact of the votes cast in each state is affected by the vote cast for the various candidates in other states. Thus, in a Presidential election a State's enforcement of more stringent ballot access requirements . . . has an impact beyond its borders. *Anderson v. Celebrezze, supra,* at 795.

Since States have a less important reason in regulating presidential elections, the " . . . national interest is greater than any interest of an individual State." *Anderson*

v. Celebrezze, supra, citing *Cousins v. Wigoda,* 419 U.S. 477, at 490 (1975). Therefore, because forty-two states and the District of Columbia allow write-in voting in presidential elections, Oklahoma's ban on write-in voting in presidential elections creates a discriminatory law as applied to the national office of President of the United States.

While three states in addition to Oklahoma completely ban write-in voting[1] (because some states which ban write-in voting in presidential elections allow write-in voting in non-presidential elections – such as local or state elections), there are actually seven states in addition to Oklahoma which ban write-in voting for President. In considering Oklahoma and the other seven states which ban write-in voting in presidential elections, it can be easily seen that the requirements for ballot access for presidential candidates (in terms of number of petition signatures and filing deadline), make Oklahoma the state with the strictest requirements. This conclusion is borne out by the following chart:

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[1] "First Amendment – Voters' Speech Rights – Federal District Courts Mandate Availability of Write-in Voting", 104 Harv.L.Rev. 657, at 662, n. 44 (1990).

1996 PRESIDENTIAL BALLOT QUALIFICATIONS FOR STATES WHICH BAN WRITE-IN VOTING FOR PRESIDENT IN GENERAL ELECTIONS

State	Number of Petition Signature Required	Filing Deadline
Louisiana	0[2]	Aug. 29
Nebraska	2,500[3]	Aug. 27
South Dakota	3,117[4]	Aug. 6
Nevada	3,761[5]	July 11
Hawaii	3,829[6]	Sept. 6
South Carolina	10,000[7]	Aug. 1
Virginia	15,021[8]	Aug. 23
Oklahoma	41,711[9]	July 15

Thus, it can be readily seen that Oklahoma represents the most extreme form of the question of how far a State may

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[2] Louisiana requires no petition signatures, but does require a $500.00 filing fee to appear on the presidential ballot in the State of Louisiana. La. Rev. Stat. Ann. tit. 18, § 465C.

[3] Nebr. Rev. Stat. § 32-504(2)(c).

[4] S.D. Codified Laws Ann. § 12-7-1.

[5] Nev. Rev. Stat. tit. 24, § 293.1715.2(c).

[6] Haw. Rev. Stat. tit. 2, § 11-113b(2)(B).

[7] S.C. Code Ann. § 7-9-10.

[8] Va. Code Ann. § 24.1-159. Virginia's requirement is based on one-half of one percent of the registered voters as of January 1, 1996. Since Virginia's future registration is not now available, the estimate shown is based on Virginia's registration for October of 1994, which was 3,004,169 registered voters.

[9] Oklahoma Stat. tit. 26, § 10-101.1 for Independent presidential candidates and 10-101.2 for unrecognized political party presidential candidates. State of Oklahoma, Election Results and Statistics, 1992.

go in having restrictive ballot access laws and banning write-in voting for President.

In November of 1992, the various third party and independent candidates who were not on the Oklahoma ballot polled a total of 375,793 votes outside of Oklahoma. *Federal Elections 92, Election Result for the U.S. President* (Federal Election Commission, June, 1993), at 9. Therefore, Oklahoma voters who wish to cast their vote for presidential candidates not on the Oklahoma ballot find themselves grouped into a discriminated against class who are denied the right to write-in their choice for President and Vice-President of the United States. It is obvious how this Court would react if voters had been prevented from voting because of their race, economic class, or religion because of a presidential election law which existed in one state and affected not only the right to vote of the citizens of that state, but diluted the votes cast by similarly situated citizens casting votes in other states.

A. The History of Past Presidential Elections Shows That There is a Strong National Interest and Value in Having Write-In Voting in Presidential Elections

Minor party and independent presidential candidates depend on their ability to receive write-in votes in order to carry out a viable national campaign. This is because it is extremely rare for a minor party or independent presidential candidate to appear on the ballot in all the jurisdictions of the Union. Since 1916 there have been only five such candidates who appeared on the ballot in all jurisdictions (viz.: John B. Anderson and Ed Clark in 1980, Lenora Fulani in 1988, and Ross Perot and Andre

Marrou in 1992). Even George Wallace in 1968 failed to qualify in the District of Columbia (see *Statistics of the Presidential Election (Year)* published by the Clerk of the United States House of Representatives for each election since 1912).

In addition to the foregoing considerations for minor party and independent candidates for President of the United States, this Court should consider that there have been problems in the past for major party candidates for President of the United States. On several occasions, even major party presidential candidates have failed to get on the General Election ballot of certain states. In 1912, the Republican nominee and incumbent President of the United States, William Howard Taft, was not on the November election ballot in California and South Dakota. In that same year, Teddy Roosevelt, as the nominee of the Bullmoose Party, failed to get on the ballot in Oklahoma. In 1948, Harry Truman, Democratic nominee and incumbent President of the United States was not on the November ballot in the State of Alabama. Once again, in 1964, the Democratic nominee and incumbent President of the United States, Lyndon B. Johnson, was not on the November ballot in Alabama. (See *Statistics of the Presidential & Congressional Elections* for 1912, 1948, and *America at the Polls, 1920-1964* by Richard M. Scammon). Fortunately, the vast majority of states do not ban write-in voting in presidential elections. However, Oklahoma, considering its severe requirements for ballot status for presidential candidates in relation to the other states which ban write-in voting in presidential elections, represents the most pronounced point of the problem.

Therefore, when a presidential candidate in the General Election is not on the ballot of a particular state, and that state does not even permit write-in voting, that presidential candidate cannot receive votes from some of his supporters. Such an occurrence not only harms the presidential candidate and the voters who are deprived of an opportunity to vote for him or her; it also harms the voters who did vote for that presidential candidate in other states – since their votes are diluted. Therefore, for the presidential candidate whose name does not appear on the ballot of all jurisdictions, support is not only denied to those voters in states where there is a ban on write-in voting in presidential elections, but also partially disenfranchises the voters in other states who can vote for that presidential candidate. Some courts have found the arguments in favor of permitting write-in voting in presidential elections persuasive. *Socialist Labor Party v. Rhodes*, 290 F.Supp. 983 (S.D.Ohio 1968), *Aff'd in part and modified in part sub nom., William v. Rhodes*, 393 U.S. 23 (1968); *Kaimins v. Board of Elections of the District of Columbia*, 324 A.2d 187 (D.C.App. 1974); and *Paul v. State of Indiana Election Board*, 743 F.Supp. 616 (S.D.Ind. 1990).[10]

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[10] Counsel is aware of two unreported cases permitting write-in votes in presidential elections. In Munn v. Michigan Secretary of State, unreported, case number 51041 (Mich., Oct. 21, 1964), the Michigan Supreme Court ordered the Secretary of State to permit and count write-in votes cast for the Prohibition Party presidential candidate. In Grogan v. Graves, unreported, case number 90-2378-0 (D.Kan. 1990), a Federal Trial Judge ordered the Kansas Secretary of State to permit and count write-ins for President as well as for Governor.

B. Balancing the Opposing Interests of Voters Wishing to Cast Write-In Votes for Presidential Candidates in Oklahoma and the Legitimate Interests of the State of Oklahoma Requires the Striking Down of Oklahoma's Absolute Ban on Presidential Write-in Voting.

The case at bar has emphasized the distinction between a ban on write-in voting for state or local elections and a ban on write-in voting for a presidential election, with the corresponding heightened constitutional scrutiny required by *Anderson v. Celebrezze*. This Court's neglect in the *Burdick v. Takushi* case to expressly address the impact of a write-in voting ban in presidential elections – in light of the stricter constitutional scrutiny required for presidential elections – leaves this Court without a decisive rule to guide its decision of the instant issue. "The difference between state and local offices and federal offices, stressed by Plaintiffs in this case, requires a different balance than that used when weighing the state's interest against the burden placed on candidates for state-wide and local offices. . . . " *Bergland v. Harris*, 767 F.2d 1551, at 1554-1555 (11th Cir. 1985). While the Trial Court stated that the Petitioners had not suggested any manner by which Oklahoma could allow write-in voting in the General Presidential Election and avoid expending funds to count ballots for fictitious candidates and/or electors or those unwilling or unqualified to serve (Appendix B, 21a-33a, at 32a), the Petitioners believe that they did present a reasonable plan in their Brief in Support of their Motion for Summary Judgment filed in the Trial Court below on February 1, 1993, as discussed hereinbelow.

II. A DECLARATION OF CANDIDACY FOR WRITE-IN CANDIDATES FOR PRESIDENT OF THE UNITED STATES BACKED UP WITH A SLATE OF ELECTORS WOULD ALLOW WRITE-IN VOTING IN THE GENERAL PRESIDENTIAL ELECTION IN SUCH A MANNER AS TO AVOID EXPENDING FUNDS TO COUNT BALLOTS FOR FICTITIOUS CANDIDATES AND/OR ELECTORS OF THOSE UNWILLING OR UNQUALIFIED TO SERVE

In 1951, California became the first state to formalize a procedure for the casting of valid write-in votes for President in the General Election. Now codified in California Election Code 7310, the law provides that a write-in candidate for President at the General Election must file a declaration of write-in candidacy and must submit a slate of presidential elector candidates who are pledged to him or her. A write-in vote for the presidential candidate is deemed to be a vote for that slate of candidates for elector. The California law was suggested by the Socialist Party (one of the parties to the instant appeal) and has been enacted in twenty-nine states and the District of Columbia.[11] The efficiency of the foregoing method is

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[11] Ariz.Rev.Stat. 16-312; Ark.Stat.Ann. 7-5-205; Cal.Elec.Code 7300ff; Colo.Rev.Stat. 1-4-1001; Ct.Gen.Stat.Ann. 9-175; D.C. Code Ann., Elec. Regs. § 1508.1-1580.3; Fla.Stat.Ann. 99.061(3); Ga.Code Ann. 21-2-133, Id. Code 34-702A; Ill.Ann.Stat. Ch. 46, § 17-16.1; Ind.Code Ann. 3-8-2-2.5; Kan. Stat. Ann. § 25-305(c); Ky. Rev. Stat. Ann. § 117.265; Md.Ann.Code art. 33, § 17.5(b); Mass.Gen.Laws Ann. Ch. 54, § 78a; Mo.Ann.Stat. 115.453(4); Mont.Code Ann. 13-10-211; Nebr.Rev.Stat. 32-428.10(2); N.M.Stat.Ann. 1-12-19.1A; N.Y.Elec.Law 6-153; N.C.Gen.Stat. 163-123(a); N.D. Century Code 16.1-12-02.2; Ohio Rev.Code 3513.041; Ore.Rev.Stat. 249.007; Tex.Elec.Code Ann. 192.036; Utah Code Ann. 20-7-20,

perhaps best demonstrated by the fact that the first recording of write-in votes for President, after the existence of the government printed ballots beginning in 1888, was in 1912 when William Howard Taft, the Republican nominee for President and incumbent President of the United States, failed to get on the California ballot. Write-in voters for Taft in California in 1912 had to write-in a full slate of presidential electors pledged to Taft, with the result that only 3,914 voters cast such a vote (only one-half of one percent of the number of votes cast for President in California in that year). (See *Statistics of the Presidential & Congressional Election for 1912*).

On the other hand, after the adoption of the new California write-in voting law for President in 1951, write-in votes for President have sometimes been cast in significant numbers. For example, independent presidential candidate Eugene McCarthy in 1976 was not on the California ballot, but received 58,412 write-in votes for President in that state. (See *Statement of Votes, November, 1976*, published by the California Secretary of State). Further, the failure to have a write-in voting provision in a presidential primary may result in a significant change in history. For example, in the Democratic presidential primary in Oklahoma in March of 1992 (at a time when the Democratic nomination for President was still hotly contested), the supporters of former Senator Paul Tsongas of

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2nd par.; Wash.Rev.Code 29.04.180; W. Va. Code § 3-6-4a; Wis.Stat.Ann. 8.185.(1). In addition, the State of Michigan follows the 1964 order of its Supreme Court and tallies write-in votes for presidential candidates who request such a tally, although there is no specific law or regulation on the subject. Munn v. Michigan Secretary of State, supra.

Massachusetts were prevented from having an opportunity to vote for him by Oklahoma's ban on write-in voting in presidential elections as the result of an error by Senator Tsongas in the filing of his presidential candidacy papers. Oklahoma law thus had an effect far beyond its borders.

Therefore, there are significant examples from other states to guide this Court and the Oklahoma Legislature on remand in providing for the protection of the constitutional rights of those voters in Oklahoma (and presidential voters in other states) who wish to cast a write-in vote in a presidential election. By adopting a plan similar to the California one, the State of Oklahoma would avoid its concern about fictitious and unqualified candidates having their write-in votes for President counted. Also, Oklahoma's concern on voter education would be aided – although it is hard to understand how a voter who casts a write-in vote for a presidential candidate would be considered less informed than one who votes for a candidate on the election ballot. Instead, it is suggested to this Court that a write-in voter represents a better informed and educated voter.

Finally, while the asserted unrestrained factionalism concern of the State of Oklahoma in banning write-in voting sounds good in theory, it is more apparent than real. With forty-two states and the District of Columbia permitting write-in voting for President, and with the other seven states which ban write-in voting in presidential elections having significantly more lenient petition requirements and deadlines after the major party presidential conventions of the Democrats and Republicans, it is unclear how Oklahoma's solitary position can justify a

total ban on presidential write-in voting in light of relatively restrictive ballot access laws for presidential candidates and the impact of Oklahoma's presidential write-in voting ban beyond the borders of Oklahoma.

CONCLUSION

Oklahoma's ban on write-in voting as it affects the presidential election impacts the only national office on which all Americans can vote. The decision of the United States Court of Appeals for the Tenth Circuit involves an important constitutional question which this Court should decide because it concerns the eight states that ban presidential write-in voting. This is an issue which – while lurking in the facts of the *Burdick v. Takushi* decision – was not directly addressed in *Burdick*. Thus, an issue of first impression is presented as to the impact of a write-in voting ban in one state as it affects the national election for President of the United States. With the 1996 presidential election fast approaching, the foregoing issue is important and will continue to be so.

WHEREFORE, premises considered, Petitioners respectfully request the Court to grant this Petition and

issue a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit to review its decision.

Respectfully submitted,

JAMES C. LINGER*
BUTLER & LINGER
1710 South Boston Avenue
Tulsa, Oklahoma 74119-4810
(918) 585-2797

Counsel for Petitioners

* Counsel of Record

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

COALITION FOR FREE AND OPEN ELECTIONS, PROHIBITION PARTY; EARL F. DODGE, Prohibition Nominee for President of the United States; GEORGE OBMSBY, Prohibition Nominee for Vice-President of the United States; LUTHER KENNICUTT; WALTER KENNICUTT; HAZELLE KENNICUTT; AARON STRANGE; EILEEN SCHUMAKER; ROBERT M. BLAIR; MRS. ROBERT M. BLAIR; HYLDA SHILLINGTON; NEW ALLIANCE PARTY; LENORA B. FULANI, Nominee for the Nomination of the New Alliance Party for President of the United States; SOCIALIST PARTY USA; J. QUINN BRISBEN, Socialist Party Nominee for President of the United States; WILLIAM D. EDWARDS, Socialist Party Nominee for Vice-President of the United States; MARIA LUIKART; EVELYN POWELL; DARIN ROHRER; DAN BOGGS; ELIZABETH S. SARGENT; MICHAEL GRIFFITH,

Plaintiffs-Appellants,

v.

BETTY McELDERRY, Chairman of the Oklahoma State Election Board; MONA LAMBIRD, Vice-Chairman of the Oklahoma State Election Board; LANCE WARD, Secretary of the Oklahoma State Election Board; GEORGE KRUMME, Member of the Oklahoma State Election Board; OKLAHOMA STATE ELECTION BOARD,

Defendants-Appellees.

No. 93-6151

(Filed Feb. 27, 1995)

Appeal from the United States District Court
for the W. D. District of Oklahoma
(D.C. No. CIV-92-465-R)

James C. Linger of Butler & Linger, Tulsa, Oklahoma for Plaintiffs/Appellants.

Rabindranath Ramana, Assistant Attorney General, Oklahoma City, Oklahoma (Susan B. Loving, Attorney General, Oklahoma City, Oklahoma, with her on the brief) for Defendants/Appellees.

Before **MOORE, EBEL,** Circuit Judges, and **VRATIL,** District Judge.*

EBEL, Circuit Judge.

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* The Honorable Kathryn H. Vratil, United States District Judge for the District of Kansas, sitting by designation.

Plaintiffs-Appellants, the Coalition for Free and Open Elections, et al., appeals the district court's grant of summary judgment in favor of Defendants-Appellees, the Oklahoma State Election Board, et al., ("Oklahoma"), holding Oklahoma's ban on write-in votes for Presidential and Vice-Presidential elections constitutional. We AFFIRM.

BACKGROUND

The Coalition, several minor political parties, their Presidential and Vice-presidential candidates, and individuals who wanted to vote for them challenge Oklahoma's election laws to the extent that such laws statutorily ban write-in voting in Presidential and Vice-presidential elections.[1]

Specifically, Appellants raise a First and Fourteenth Amendment challenge to Oklahoma Statute Title 26, § 7-127(1), which provides: "If the name of any person is written on a ballot, said name shall not be counted." Appellants do not argue that every ban on write-in voting is unconstitutional. Instead, they argue that Oklahoma's ban as applied to Presidential and Vice-presidential elections is unconstitutional when considered in conjunction with Oklahoma's other ballot access laws. Appellants reason that the constitutionality of a ban on write-in

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[1] The parties stipulated that the individual Oklahoma voters who wished to cast their votes by write-in for President and Vice-President were the only necessary Plaintiffs to challenge the constitutionality of the statutes at issue.

voting cannot be judged in a vacuum, and that the more restrictive a State's other means of ballot access are, the more critically such a ban must be viewed. Because Oklahoma's ballot access laws require early filing deadlines and a large number of signatures in order for a candidate to be placed on the general election ballot, Appellants contend that Oklahoma's write-in ban for Presidential and Vice-Presidential elections fails this critical review.

Because we agree that there is a relationship between a State's ability to ban write-in voting and the ability of candidates to gain ballot access in other ways, *see Burdick v. Takushi*, 112 S. Ct. 2059, 2067 (1992), our review of Oklahoma's write-in ban necessarily requires us to analyze Oklahoma's ballot access laws. Oklahoma law provides four alternatives to write-in voting for a Presidential elector to be listed on the general election ballot: (1) as an elector for a recognized political party, Okla. Stat. tit. 26, §§ 1-108, 10-101; (2) as an uncommitted elector, *id.* § 10-101; (3) as an elector for an independent candidate, *id.* § 10-101.1; or (4) as an elector for an unrecognized political party, *id.* § 10-101.2.

To get placed on the election ballot under Oklahoma's first alternative – as a Presidential elector for a recognized political party – it is first necessary that the party itself obtain "recognized" status. In order to become a recognized political party, the party must file a notice of intent to form a political party, which may *not* be done between March 1 and November 15 of an even-numbered year (i.e., an election year). *Id.* § 1-108(1). Within one year following such a filing, the party must then obtain signatures of registered voters equal to at least 5% of the total votes cast in the preceding general

election for Governor or for Presidential electors. *Id.* § 1-108(2).[2] The party may not obtain these signatures between May 31 and November 15 of an election year. *Id.* If these signatures are timely obtained, the party will be a "recognized party" for the subsequent general election, with the caveat that a recognized party may not be formed between July 1 and November 15 of an election year. *Id.* §§ 1-108, 1-108(3). The party then must select its Presidential electors at a statewide convention and certify the elector nominees not more than 180 days, nor fewer than 90 days, before the general election at issue (i.e., between early May and early August). *Id.* § 10-101. The party remains a recognized party so long as its nominees for Governor or Presidential electors receive at least 10% of the total votes cast for said office at each election. *Id.* § 1-109. If not, the party must complete the steps for recognition anew. *Id.*

To get placed on the election ballot under Oklahoma's second alternative – as an uncommitted Presidential elector – one must file by July 15 of the presidential election year petitions containing signatures of registered voters equal to at least 3% of the total votes cast in the last general election for President. *Id.* at § 10-101(1).

To get placed on the election ballot under Oklahoma's third alternative – as a Presidential elector for an

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[2] Because the election for Governor takes place in the alternate even-numbered year when there is no Presidential election, the number of total votes cast will be determined sometimes by a Presidential election and sometimes by a Gubernatorial election.

independent candidate – one must file petitions conforming to the same rules and timing requirements as uncommitted Presidential elector candidates. *Id.* at § 10-101.1(1). Additionally, a list of the nominees for electors pledged to the independent Presidential candidate and the name of the Vice-Presidential running mate must be filed by September 1 of the election year, *id.* at § 10-101.1(3), almost one full month after recognized parties are required to certify their elector nominees, *see id.* at § 10-101. The elector nominees must then file by September 15 their signed oaths to cast their ballots, if elected, for the named independent Presidential and Vice-Presidential candidates. *Id.* at § 10-101.1(3).

To get placed on the election ballot under Oklahoma's fourth alternative – as an elector for an unrecognized political party – the party must file signature petitions conforming to the same rules and timing requirements as uncommitted electors and electors for independent candidates. *Id.* § 10-101.2(1). The unrecognized party must also file a notice of intent to circulate these petitions prior to actual circulation. *Id.* The same certification and oaths that an elector for an independent candidate must file are also required. *Id.* § 10-101.2(3).

It is against this backdrop of Oklahoma's other ballot access laws that Appellants advance their position that Oklahoma's ban on write-in voting in Presidential elections is an impermissible burden on their First and Fourteenth Amendment rights. Oklahoma argues that its ban on write-in voting does not impermissibly burden Appellants' constitutional rights because, under the balancing test set forth by the Supreme Court in *Anderson v. Celebrezze*, 460 U.S. 780 (1983), and *Burdick v. Takushi*, 112 S.

Ct. 2059 (1992), and the Tenth Circuit's application of that test in *Rainbow Coalition v. Oklahoma State Election Bd.*, 844 F.2d 740 (10th Cir. 1988), its interests justifying the ban outweigh any burdens on Appellants' rights. The district court agreed with Oklahoma's position and granted Oklahoma's motion for summary judgment. Appellants challenge that decision in this appeal.

DISCUSSION

We review the grant of summary judgment de novo, applying the same legal standard as the district court. *Universal Money Ctrs., Inc. v. AT&T*, 22 F.3d 1527, 1529 (10th Cir.), *cert. denied*, 115 S. Ct. 655 (1994). Summary judgment is appropriate if there is no genuine issue as to any material fact and Oklahoma, the moving party, is entitled to judgment as a matter of law. *Id.* Because there is no dispute of material fact, we consider only whether the district court correctly concluded that Oklahoma was entitled to judgment under the applicable substantive law. *See Applied Genetics Int'l, Inc. v. First Affiliated Sec., Inc.*, 912 F.2d 1238, 1241 (10th Cir. 1990).

When reviewing the constitutionality of State burdens on the right to vote, we must weigh "the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate" against "the precise interests put forward by the State as justifications for the burden imposed by its rule," taking into consideration not only "the legitimacy and strength of each of those interests," but also "the extent to which those interests make it necessary to burden the plaintiff's rights." *Anderson v.*

Celebrezze, 460 U.S. 780, 789 (1983). This "balancing test" has been reaffirmed by the Tenth Circuit in *Rainbow Coalition v. Oklahoma State Election Bd.*, 844 F.2d 740, 743 (10th Cir. 1988), and in *Hagelin for President Comm. of Kan. v. Graves*, 25 F.3d 956, 959 (10th Cir. 1994), *cert. denied*, 115 S. Ct. 934 (1995).

The Supreme Court clarified this standard in *Burdick v. Takushi*, by explaining that

> [u]nder this standard, the rigorousness of our inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights. Thus, as we have recognized when those rights are subjected to severe restrictions, the regulation must be narrowly drawn to advance a state interest of compelling importance. But when a state election law provision imposes only reasonable, nondiscriminatory restrictions upon the First and Fourteenth Amendment rights of voters, the State's important regulatory interests are generally sufficient to justify the restrictions.

112 S. Ct. 2059, 2063-64 (1992) (internal citations omitted). Accordingly, a court must first review the State's overall ballot access scheme, weighing the State's interests in ballot access restrictions against the burdens those restrictions impose on voters' interests.

When the Supreme Court applied this balancing test in response to a specific challenge to a ban on write-in votes in *Burdick*, it went on to hold "that when a State's ballot access laws pass constitutional muster as imposing only reasonable burdens on First and Fourteenth Amendment rights[,] . . . a prohibition on write-in voting will be

presumptively valid, since any burden on the right to vote for the candidate of one's choice will be light and normally will be counterbalanced by the very state interests supporting the ballot access scheme." *Burdick*, 112 S. Ct. at 2067 (reviewing Hawaii's ban on write-in voting). Thus, a court must determine, secondly, if the competing interests are such that this presumption should be overcome.

Following this two-step process outlined in *Burdick*, we first review the legitimacy of Oklahoma's ballot access laws for Presidential electors and conclude in Part I that, as in *Burdick*, those laws "pass constitutional muster." In Part II, we then address whether the resulting presumption that Oklahoma's ban on write-in voting is valid should be overcome, and conclude that the presumption prevails in this case. Accordingly, we agree with the district court that Oklahoma was entitled to judgment as a matter of law.

I. Oklahoma's Ballot Access Laws

As mentioned above, Oklahoma's ballot access laws provide four alternatives to write-in voting for Presidential electors to gain access to a general election ballot: as an elector for a recognized political party, as an uncommitted elector, as an elector for an independent candidate, and as an elector for an unrecognized political party.

We have previously reviewed and upheld Oklahoma's ballot access laws governing the first of these

alternatives in *Rainbow Coalition*, 844 F.2d 740. Specifically, we reviewed the laws requiring signature petitions for recognized party status to be filed no later than May 31 of the election year with the signatures of registered voters equal to at least 5% of the votes cast in the last election for Governor or for Presidential electors. In Rainbow. we upheld both the early filing deadline and the 5% threshold. *Id.* at 744, 747. The *Rainbow* court balanced the voters' freedom of expression and association rights embodied in the right to vote against Oklahoma's interests in running an orderly and timely election and found that Oklahoma's interests prevailed. We were somewhat troubled by the early filing deadline, but found that the State had a sufficient interest in such an early deadline because it needed to verify the signatures on the petitions, conduct primary elections and run-off primaries if necessary, allow challenges to the candidates' qualifications, administer recounts, allow judicial resolution of election challenges, print ballots, and mail out and receive absentee ballots. *Id.* at 745-47.

Appellants argue, however, that *Rainbow* does not end our inquiry because it only involved review of Oklahoma's access laws governing recognized party status. Appellants are correct that in *Rainbow* we did not address Oklahoma's ballot access laws as they pertain to uncommitted electors, electors for independent candidates, and electors for unrecognized parties.[3] As a practical matter,

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[3] In *Rainbow*, the plaintiffs did raise an additional challenge to the Oklahoma law that prevents members of nonrecognized political parties from designating their party affiliation on the voter registration rolls, 844 F.2d at 747. However, the plaintiffs

however, *Rainbow*'s discussion of the impact on voters' rights of the filing deadlines and signature petition requirements for gaining ballot access through the recognized party route sheds much light on our review of Oklahoma's ballot access laws for uncommitted electors, electors for independent candidates, and electors for unrecognized parties.[4]

In contrast to the May 31 filing deadline for recognized party electors that we upheld in *Rainbow*, Oklahoma requires nonrecognized party electors to submit their signature petitions by July 15 of the election year. This deadline is only about two weeks before the latest date on which recognized party candidates must declare their elector nominees and approximately six weeks after recognized party petitions must be filed. Nonrecognized party electors do not have to declare their elector nominees until September 1, approximately one month after the latest date on which recognized parties must declare their elector nominees. Thus, we conclude that the ballot access burdens for nonrecognized parties are not as severe as the burdens placed on recognized parties that we have already held in *Rainbow* to be constitutional. Although we noted in *Rainbow* that a State does have a "greater interest" in imposing restrictions on the organization of new political parties than on ballot access for minority candidates because of the additional need "to provide assurance that the particular party designation

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in *Rainbow* did not challenge more generally Oklahoma's laws governing ballot access for nonrecognized party electors.

[4] Hereinafter, uncommitted electors, electors for independent candidates, and electors for unrecognized parties are collectively referred to as "nonrecognized party electors."

has some meaning," many of the other state interests listed in *Rainbow* still exist to outweigh the less onerous burden of the later filing deadline for nonrecognized party electors.[5] *See Rainbow*, 844 F.2d at 746 n.9 (internal quotation omitted). Thus, we find that the July 15 deadline for the signature petitions of nonrecognized party electors, like the May 31 deadline for recognized party electors upheld in *Rainbow*, "passes constitutional muster" as well.

In contrast to the petition requirement that we upheld in *Rainbow*, which required recognized parties to file signature petitions equal to at least 5% of the votes cast in the last election for Governor or for Presidential electors, Oklahoma law requires electors for nonrecognized parties to submit petitions with signatures of registered voters equal to at least 3% of the total votes cast in the most recent Presidential election. Because the 3% requirement is less burdensome than the 5% requirement we upheld in *Rainbow*, we find the 3% requirement constitutional as well.[6] This conclusion is bolstered by the

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[5] For example, Oklahoma's need to count and verify the signatures on the petitions early enough to allow said petitioners to be notified of their right to be on the ballot so that the petitioners can timely comply with the September 1 deadline to submit their nominee certifications and the September 15 deadline to submit the oaths of its pledged electors is similar to its needs to timely count and verify recognized party petition signatures articulated in *Rainbow*.

[6] The nonrecognized parties really have two chances to get on the ballot. They can first attempt to meet the May 31 deadline and 5% signature threshold to be recognized as a party. If they fail to meet either of these requirements, they can attempt to meet the July 15 deadline and 3% signature threshold. In fact, it

fact that the names of nonrecognized party electors may be submitted almost one full month *after* recognized parties must certify the names of their elector nominees. Okla. Stat. tit. 26, §§ 10-101.1(3), 10-101.

Thus, under the standards set forth in *Anderson* and *Burdick* we conclude that Oklahoma's ballot access laws governing nonrecognized party electors, like those governing recognized party electors, impose only reasonable burdens on Appellants' First and Fourteenth Amendment rights. *See Rainbow,* 844 F.2d 740.

II. Ban on Write-In Votes

Because we find Oklahoma's ballot access laws constitutional, we also concluded that Oklahoma's challenged ban on write-in voting is presumptively valid. *See Burdick,* 112 S. Ct. at 2967. As the Court stated in *Burdick,* "when a State's ballot access laws pass constitutional muster as imposing only reasonable burdens on First and Fourteenth Amendment rights – as do Hawaii's election laws – a prohibition on write-in voting will be presumptively valid, since any burden on the right to vote for the candidate of one's choice will be light and normally will be counterbalanced by the very state interests supporting the ballot access scheme." *Id.*

Oklahoma asserted this presumption and articulated a number of State interests furthered by its ban on write-

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seems that they can go door to door with both sets of petitions so that they keep their second option viable if they fail to meet the stricter requirements under the recognized party provisions.

in voting. These interests include discouraging unrestrained factionalism in the general election, limiting the general election to recognized parties and to those parties and candidates that are well supported as evidenced by their ability to meet the signature requirements, focusing the voters on major issues and candidates, and conserving state resources by reducing the risk that resources will be used to count votes for fictitious candidates or those unwilling or unqualified to serve in public office.[7] Oklahoma was the first state to implement "a uniform, standardized system of voter registration, election administration and voting statewide. . . . Hand evaluation and counting of ballots designed for electronic counting devices would defeat major advantages of the counting devices. Subjectivity of counters would be reintroduced into the system, timely results would be delayed and hand counting costs would be reintroduced." Affidavit of Lance Ward, Secretary of the Oklahoma State Election Board, Appellants' App. at 18, ¶¶ 1, 5. The State's interest in voter education is also served because the ballot access laws combined with the ban on write-in voting encourage

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[7] Oklahoma uses automated vote counting, which does not currently allow for the counting of write-in votes. The costs to count write-in votes for all elections was estimated at $1 million. The district court found, however, that "[t]he costs of counting write-in votes only in general presidential elections would not appear to be prohibitive." *See* District Court Order, March 26, 1993, at 12; *see also* Affidavit of Lance Ward, Secretary of the Oklahoma State Election Board, Appellants' App. at 18 (stating that the initial cost to rewrite the software so that it would segregate ballots containing write-in votes to enable those votes to be hand-counted was "unknown").

candidates and parties to publicize their candidacy early enough to allow for extended public debate.

To overcome Oklahoma's asserted interests and *Burdick*'s rebuttable presumption that Oklahoma's ban on write-in voting is valid, Appellants challenge Burdick's applicability on three grounds. First, Appellants contend that *Burdick*'s presumption does not apply to Presidential and Vice-presidential elections. Second, Appellants claim that *Burdick*'s presumption does not apply because Oklahoma's ballot access laws are more onerous than the ballot access laws of Hawaii that triggered the presumption of validity for Hawaii's write-in voting ban. Third, Appellants assert that Oklahoma has less interest in a Presidential election than in a state or local election, thereby overcoming the presumption in this case. We address and reject each of Appellants' challenges in turn.

Appellants first argue that *Burdick* does not apply here because the *Burdick* Court did not discuss Hawaii's ban on write-in voting specifically in the context of a Presidential election. However, as the district court correctly pointed out, the *Burdick* Court reviewed Hawaii's ban on write-in voting by applying the balancing test set forth in *Anderson* – a balancing test articulated in the context of a challenge to State laws restricting ballot access laws in a Presidential election. *Burdick*, 112 S. Ct. at 2063 (applying *Anderson*, 460 U.S. at 789, which reviewed a challenge to an early filing deadline for independent Presidential candidates).[8] Thus, even if the specific state

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[8] Moreover, the petitioner in *Burdick* challenged the constitutionality of Hawaii's ban on write-in voting not only in the

and voter interests to be balanced in evaluating whether to rebut *Burdick*'s presumption of validity for write-in voting bans differ in the context of a Presidential election, the presumption itself still applies whenever, as here, the State's ballot access laws are constitutional.

Appellants second contention is that *Burdick* does not apply because Oklahoma's ballot access laws are more onerous than Hawaii's. However, even if Appellants were correct that Oklahoma's ballot-access laws are more restrictive than Hawaii's, Appellants would not have shown enough to avoid *Burdick*'s presumption. For *Burdick*'s presumption not to attach, Appellants would have to show not just that Oklahoma's ballot access laws are more restrictive than Hawaii's, but that Oklahoma's ballot access laws are so restrictive as to burden impermissibly voters' constitutional rights – a proposition that we have already concluded is not the case.

At any rate, it is unclear to us that Oklahoma's ballot access laws are indeed more burdensome than Hawaii's laws. Although Hawaii's ballot access laws make it easier to gain ballot access in a nonpartisan *primary* election,

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non-presidential election specifically at issue in the case, but also in future elections, which would presumably include elections for Presidential electors. *Burdick*, 112 S. Ct. at 2061 (The petitioner claimed "that he wished to vote in the primary and general elections for a person [for Hawaii's House of Representatives] who had not filed nominating papers *and that he wished to vote in future elections for other persons whose names were not and might not appear on the ballot.*" (emphasis added)). Even in the face of this broad-based challenge, however, the *Burdick* Court did not explicitly exclude Presidential elections from its analysis.

Hawaii's laws actually may make it more difficult to gain access to a *general* election ballot. While Hawaii's ballot access laws only require 15 to 25 signature petitions to participate in the nonpartisan primary, to get on the general election ballot a candidate has to win either 10% of the primary vote or the number of votes that was sufficient to nominate a partisan candidate, whichever is less. *Burdick,* 112 S. Ct. at 2065 (citing Haw. Rev. Stat. §§ 12-3 to 12-7). Only 8 of 26 nonpartisans who entered the nonpartisan primaries in the last ten years have overcome this second hurdle to gain ballot access in the general election. *Id.* at 2065. While Oklahoma's ballot access laws, in contrast, require nonrecognized party electors to obtain far more signature petitions, Oklahoma does not have Hawaii's restrictive rules governing advancement from a primary to general election ballot. Additionally, to gain recognized party status in Hawaii, the party must submit petitions 150 days before the general election (in early June) with signatures equal to 1% of all registered voters, *id.* at 2064 (citing Haw. Rev. Stat. § 11-62); whereas, to gain recognized party status in Oklahoma, the party has through May 31 to submit petitions with signatures of 5% of only those registered voters who voted in the last election for Governor or for Presidential elector. Okla. Stat. tit. 26, § 1-108(2). Thus, because it is not clear that Hawaii's ballot access laws are less burdensome than Oklahoma's, or at least not substantially more burdensome, *Burdick's* presumption may not be challenged on this ground.

Appellants' third argument is that even if *Burdick*'s presumption attaches to the write-in ban in this case, that presumption should be overcome because the State has

less of an interest in regulating a Presidential election. Appellants are correct that the State's interest in banning write-in votes is less in Presidential elections than in State and local elections. The *Anderson* Court said that,

> in the context of a Presidential election, state-imposed restrictions implicate a uniquely important national interest. For the President and Vice President of the United States are the only elected officials who represent all the voters in the Nation. Moreover, the impact of the votes cast in each State is affected by the votes cast for the various candidates in other States. Thus in a Presidential election a State's enforcement of more stringent ballot access requirements, including filing deadlines, has an impact beyond its own borders. Similarly, the State has a less important interest in regulating Presidential elections than statewide or local elections, because the outcome of the former will be largely determined by voters beyond the State's boundaries.

460 U.S. at 794-95 (footnotes omitted). *Anderson* does not, however, stand for the proposition that every state regulation of Presidential elections will fail to pass constitutional muster. Instead, in determining whether *Burdick*'s presumption should be overcome in this case, *Anderson* simply instructs us to consider the uniquely national interests involved in Presidential elections when we balance the interests at stake.

Although Oklahoma does have less of an interest in regulating Presidential elections than state or local elections, Appellants' interest in write-in voting is also less in this context. In *Burdick*, the Court explained that the

primary function of the election process is "to winnow out and finally reject all but the chosen candidates, not to provide a means of giving vent to short-range political goals, pique, or personal quarrel[s]. Attributing to elections a more generalized expressive function would undermine the ability of States to operate elections fairly and efficiently." 112 S. Ct. at 2066 (internal citations omitted). In the context of a Presidential election, the function of actually getting a candidate elected is only nominally advanced by the use of write-in voting, because of the extreme unlikelihood that a write-in campaign for President could ever be successful.[9] In this context, rather than serving to "winnow out" the field and getting a candidate elected, write-in voting primarily serves the expressive function described in *Burdick*:

> [T]he objection to the specific ban on write-in voting amounts to nothing more than the insistence that the State record, count, and publish individual protests against the election system or the choices presented on the ballot through the efforts of those who actively participate in the system. There are other means available, however, to voice such generalized dissension from the electoral process; and we discern no adequate basis for our requiring the State to provide and to finance a place on the ballot for

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[9] The potential effectiveness of write-in voting in a Presidential election is further diminished in Oklahoma, which requires all its Presidential electors to cast their votes for the plurality winner in the general election. Thus, Oklahoma has an additional interest in having its voters use their votes for viable candidates who have exhibited some degree of support through the ballot access process.

> recording protests against its constitutionally valid election laws.

Burdick, 112 S. Ct. at 2067. Thus, while we acknowledge, as the court did in *Burdick*, that voters do have a right "to make free choices and to associate politically through the vote," the Court has made it clear that reasonable regulations advancing the primary function of the election process will be upheld, even when they "have the effect of channeling expressive activity at the polls." *Id.* at 2066. Thus, even though Oklahoma has a lesser interest in regulating ballot access in a Presidential election than a state or local election, Oklahoma's asserted interests still outweigh the voters' diminished interest in write-in voting in the context of a Presidential election.

Thus, having determined that Oklahoma's ballot access laws do not impermissibly burden voters' constitutional rights and that *Burdick*'s presumption of validity therefore attaches to Oklahoma's ban on write-in voting, we conclude that Appellants interests are not strong enough to overcome that presumption.

CONCLUSION

Accordingly, we **AFFIRM** the district court's grant of summary judgment to Appellees.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

COALITION FOR FREE AND OPEN ELECTIONS; PROHIBITION PARTY, et al.,	)	
Plaintiffs,	)	**CIV-92-465-R**
v.	)	**(Filed Mar. 26, 1993)**
BETTY McELDERRY, et al.,	)	
Defendants.	)	

ORDER

> The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government.
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> *Reynolds v. Sims*, 377 U.S. 533, 555, 84 S.Ct. 1362, ___, 12 L.Ed.2d 506, 523 (1964).

"Other rights, even the most basic, are illusory if the right to vote is undermined." *Wesberry v. Sanders*, 376 U.S. 1, 17, 84 S.Ct. 526, ___, 11 L.Ed.2d 481, 492 (1964).

This case concerns the rights of Oklahoma voters to cast their ballots for persons of their choosing and to have their votes counted in Oklahoma's general presidential elections. The Plaintiffs herein, political parties or unincorporated associations which are not recognized as political parties by the State of Oklahoma and who did not appear on the Oklahoma ballot for the 1992 general election but wished to have their candidates on the Oklahoma ballot, individual candidates of such parties or associations who wished to be write-in candidates on the

Oklahoma ballot for the November 1992 general election and individual Oklahoma voters who wished to cast their votes for candidates for President and Vice President who were not on the Oklahoma ballot in 1992,[1] challenge the constitutionality of an Oklahoma statute, Okla. Stat. tit. 26, § 7-127(1), which bans write-in voting in all Oklahoma elections, as applied to presidential elections.

The parties have stipulated to all of the facts material to the constitutional issue and have filed cross-motions for summary judgment.

Plaintiffs and Defendants agree and the Court concludes that the appropriate standard of review of the constitutionality of a state election law is to

> weigh "the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate" against "the precise interests put forward by the State as justifications for the burden imposed by its rule," taking into consideration "the extent to which those interests make it necessary to burden the plaintiff's rights."
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> *Burdick v. Takushi*, 504 U.S. ___, ___, 112 S.Ct. 2059, ___, 119 L.Ed.2d 245, 253 (1992) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789, 103

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[1] Defendants have stipulated that the only necessary Plaintiffs herein are the individual Oklahoma voter Plaintiffs who wished to cast their votes for presidential electors for the candidates of the Prohibition Party for President and Vice-President of the United States.

S.Ct. 1564, ___, 75 L.Ed.2d 547, 558 (1983)).

From that point of agreement the parties' views as to controlling case law, interpretation thereof and application to the issues herein diverge.

Plaintiffs argue that the United States Supreme Court's decision in *Burdick v. Takushi* is distinguishable from the case at bar because 1) the case did not involve or the Court therein did not address the write-in vote ban as applied to presidential elections, and 2) ballot access in Hawaii is easy, *Burdick v. Takushi*, 504 U.S. at ___, 112 S.Ct. at ___, 119 L.Ed.2d at 255, in contrast to ballot access for presidential and vice-presidential candidates in Oklahoma. Plaintiffs in effect assert that the character and magnitude of the injury to the First and Fourteenth Amendment rights Plaintiffs seek to vindicate is great because the rights Plaintiffs seek to vindicate are among the most precious and fundamental of Constitutional rights and the state's interest in regulating presidential elections is less than that of regulating statewide or local elections. Plaintiffs argue that Oklahoma's only justification for banning write-in voting is the expense that the state would be required to incur to provide for and count write-in votes and that the write-in voting ban is not compelling (and perhaps not even legitimate) because a number of other measures not employed would more significantly reduce expenses. They bolster this argument by pointing out that only four states completely ban

write-in voting.[2] When Plaintiffs engage in the weighing of injury to their individual constitutional rights against the interests that the state seeks to advance and the extent to which those interests make it necessary to burden Plaintiffs' rights, Plaintiffs conclude that the Oklahoma statute is unconstitutional: "[A] total ban on write-in voting in presidential elections is such a complete restriction on voter's [sic] rights that it cannot be justified by a mere argument of additional expense and inconvenience to the State of Oklahoma." Brief in Support of Plaintiffs' Motion at p. 13.

Defendants assert that nothing in the Supreme Court's opinion in *Burdick* suggests an analytical distinction or that a different standard applies to Presidential elections than to state and local elections. Secondly, Defendants assert that there is no significant qualitative difference between Oklahoma and Hawaii in ease of ballot access and point out that Oklahoma's ballot access laws for Presidential elections have passed constitutional muster, citing *Rainbow Coalition of Oklahoma v. Oklahoma State Election Board,* 844 F.2d 740 (10th Cir. 1988). Accordingly, Defendants argue, under *Burdick,* Oklahoma's prohibition on write-in voting is presumptively valid. Beyond such presumption, however, Defendants assert that Oklahoma's prohibition of write-in voting imposes

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[2] See Brief in Support of Plaintiffs' Motion for Summary Judgment at p. 12, citing "First Amendment – Voters' Speech Rights – Federal District Courts Mandate Availability of Write-In Voting," 104 Harv. L. Rev. 657, 662 n. 44 (1990). Apparently seven other states ban write-in voting in presidential general elections. *See* Plaintiffs' Brief in Opposition to Defendants' Motion for Summary Judgment at p. 4 & n. 2.

only a limited burden on Plaintiffs' First Amendment rights because Plaintiff Prohibition Party has 3 1/2 years to engage in political activity leading to recognition as a political party and authorization to nominate candidates for President and Vice-President whose names will appear on the general election ballot and, in any event, Plaintiffs may advance their views by engaging in a variety of other political activities protected by the First Amendment. Several important state interests support Oklahoma's write-in vote ban, Defendants assert: discouragement of unrestrained factionalism in the general election so as to focus interest on major issues and candidates; reduction of the risk of spending funds to count votes for fictitious candidates or those unwilling to hold public office; and encouragement of discussion of issues and candidates for a substantial period of time before the general election, i.e., voter education. These state interests, Defendants assert, outweigh the limited burden imposed by Oklahoma's disallowance of write-in voting upon Plaintiffs' First Amendment rights.

The Court agrees with Defendants that nothing in the Supreme Court's opinion in *Burdick v. Takushi* indicates that the analysis therein is limited in application to state laws applicable only to state or local elections. Indeed, it appears that Hawaii's statute banning write-in voting considered in *Burdick* is applicable to presidential elections. Moreover, the Court in *Burdick* applied the same standard utilized in *Anderson v. Celebrezze*, 460 U.S. 780, 103 S.Ct. 1564, 75 L.Ed.2d 547 (1983) to test the constitutionality of a state's election law which limits who may appear on the ballot for national elections in that state. On the other hand, the Court agrees with Plaintiffs that

Oklahoma's interest in banning write-in voting is of lesser importance in national elections than in state or local elections. The Supreme Court so said in *Anderson v. Celebrezze*, 460 U.S. at 795, 103 S.Ct. at ___, 75 L.Ed.2d at 561-62.[3]

Although Oklahoma's May 31 deadline for filing petitions seeking recognized party status, *see* Okla. Stat. tit. 26, § 1-108(2), after which such a party has the right to submit electors for the offices of President and Vice-President pursuant to Okla. Stat. tit. 26, § 10-101, has been described as "troublesomely early," *Rainbow Coalition v. Oklahoma State Election Board*, 844 F.2d at 747 (quoting the district court's opinion) and the Tenth Circuit Court of Appeals has characterized the requirement that a petition seeking party recognition bear the signatures of registered voters equal to at least five percent (5%) of the total votes cast in the last general election either for governor or for presidential and vice-presidential electors as a "relatively high signature requirement," *id.*, the Tenth Circuit has upheld the constitutionality under the First and Fourteenth Amendments of those particular ballot access laws. *Rainbow Coalition v. Oklahoma State Election Board*,

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[3] "[I]n the context of a Presidential election, State imposed restrictions implicate a uniquely important national interest. For the President and the Vice-President of the United States are the only elected officials who represent all the voters in the Nation. Moreover, the impact of the votes cast in each State is affected by the votes cast for the various candidates in other states. Thus, in a Presidential election, a State's enforcement of more stringent ballot access requirements . . . has an impact beyond its own borders."

Anderson v. Celebrezze, 460 U.S. at 795, 103 S.Ct. at ___, 75 L.Ed.2d at 561-62.

844 F.2d at 744-47. There are, however, other modes of access to the ballot in Oklahoma which may ameliorate the impact of Oklahoma's statutory ban on write-in voting. *See* Okla. Stat. tit. 26, § 10-101(1), § 10-101.1(1) & § 10-101.2(1). The Oklahoma Supreme Court has upheld the constitutionality of Okla. Stat. tit. 26, § 10-101 against a challenge by electors for presidential and vice-presidential candidates of the American Party on the grounds, *inter alia*, that the statute violated their guarantee of free speech and right to associate under the First and Fourteenth Amendments to the United States Constitution. *See McClendon v. Slater*, 554 P.2d 774, 777 (Okla. 1976), *cert. denied*, 429 U.S. 1096, 97 S.Ct. 1112, 51 L.Ed.2d 543 (1977). The other ballot access provisions, Okla. Stat. tit. 26, § 10-101.1 & § 10-101.2, are identical in substance to § 10-101 but relate to the placement on the ballot of presidential and vice presidential electors pledged to the Independent candidate for President (§ 10-101.1) and of electors pledged to the nominee of an unrecognized political party (§ 10-101.2) rather than the placement on the ballot of presidential electors who are uncommitted (§ 10-101). All three statutes require the filing of a petition no later than July 15 containing the signatures of registered voters equal to at least 3% of the total votes cast in the last general election for President. *See* Okla. Stat. tit. 26, § 10-101(1); § 10-101.1(1); § 10-101.2(1). Thus, all of Oklahoma's ballot access laws relating to general elections for President are constitutional under the First and Fourteenth Amendments to the United States Constitution. Accordingly, the Court is compelled to conclude, under the authority of *Burdick v. Takushi*, 504 U.S. at ___, 112 S.Ct. at ___, 119 L.Ed.2d at 258, that Oklahoma's

statutory prohibition on write-in voting as applied to general presidential elections is presumptively valid, because any burden on the right to vote for the candidate of one's choice is light when all means of ballot access are considered and is counterbalanced by the state's interest in setting a "relatively early filing date" considered by the Tenth Circuit in *Rainbow Coalition v. Oklahoma State Election Board*, 844 F.2d at 744-747, which is equally applicable to the other ballot access laws.

However, the Court will not end its analysis upon a presumption of validity. Rather, the Court will weigh the character and magnitude of the asserted injury to Plaintiffs' First and Fourteenth Amendment rights that they seek to vindicate against the interests advanced by the State of Oklahoma as justifications for the burdens imposed by its prohibition on write-in votes, with consideration given to the extent to which those interests necessitate burdening Plaintiffs' rights. *See Burdick v. Takushi*, 504 U.S. at ___, 112 S.Ct. at ___, 119 L.Ed.2d at 253 (quoting *Anderson v. Celebrezze*, 460 U.S. at 789, 103 S.Ct. at ___, 75 L.Ed.2d at 558).

It is undisputed that at least Plaintiff Prohibition Party had neither the support nor money to circulate a successful petition among the registered voters of the State of Oklahoma in order to obtain recognized political party status pursuant to Okla. Stat. tit. 26, § 1-108, or to obtain placement of the names of presidential electors pledged to its nominee for President as an unrecognized political party on the Oklahoma ballot for the 1992 general election pursuant to Okla. Stat. tit. 26, § 10-101.2. See Brief in Support of Plaintiff's Motion for Summary Judgment, Statement of Material Facts to Which No Genuine

Issue Exists at ¶ 7 and Brief in Support of Defendants' Objection to Plaintiffs' Motion, Response to Plaintiffs' Statement of Uncontroverted Facts. Nevertheless, in assessing the character and magnitude of the injury to the First and Fourth Amendment rights the Plaintiffs herein seek to vindicate or the actual burden on Plaintiffs' rights to vote for Presidential and Vice Presidential candidates of their choosing and to political association with voters of other states who cast their votes for, e.g., Prohibition Party candidates, the Court cannot ignore Oklahoma's ballot access laws. The United States Supreme Court has emphasized the relationship between ballot access laws and a law prohibiting write-in voting, considering the constitutionality of the latter only as a part of an entire electoral scheme. *See Burdick v. Takushi*, 504 U.S. at ___, 112 S.Ct. at ___, 119 L.Ed.2d at 254-56 & 258. The Supreme Court has observed that where a state's ballot access laws impose only reasonable burdens on voters' freedom of choice and association,

> the objection to the specific ban on write-in voting amounts to nothing more than the insistence that the State record, count and publish individual protests against the election system or the choices presented on the ballot through the efforts of those who actively participate in the system. There are other means, however, to voice such generalized dissension from the electoral process; and we discern no adequate basis for our requiring the state to provide and to finance a place on the ballot for recording protests against its constitutionally valid election laws.
>
> *Burdick v. Takushi*, 504 U.S. at ___, 112 S.Ct. at ___, 119 L.Ed.2d at 258.

Oklahoma's ballot access laws, considered as a whole, impose only reasonable burdens on Plaintiffs' First and Fourteenth Amendment rights. The character of the injury to Plaintiffs' rights to vote and to associate with other Oklahomans or with voters of other states for political purposes is more theoretical or illusory than real, given that the purpose of elections is not to serve a "generalized expressive function," *Burdick*, 504 U.S. at ___, 112 S.Ct. at ___, 119 L.Ed.2d at 256; that the right to vote in any manner and the right to associate for political purposes through the ballot are not absolute, *see Burdick*, 504 U.S. at ___, 112 S.Ct. at ___, 119 L.Ed.2d at 252, but are merely the "right to participate in an electoral process that is necessarily structured to maintain the integrity of the democratic system," *id.* 504 U.S. at ___, 112 S.Ct. at ___, 119 L.Ed.2d at 258; and that if less than a plurality of Oklahoma voters cast their ballots by write-in or otherwise for, e.g., electors pledged to the Prohibition Party candidates, none of Oklahoma's electoral votes would go to the Prohibition Party Presidential and Vice-Presidential candidates.[4] The magnitude of the injury to Plaintiffs' right to vote for the candidates of their choice and to associate with other voters within or without the State of Oklahoma for political purposes is also slight for the same reasons and for the additional reason that there are other avenues available to Plaintiffs to protest choices

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[4] *See* U.S. Const. art. 2, § 1; U.S. Const. amend. XII; Okla. Stat. tit. 26, §§ 10-103 & 10-107 (election of Presidential electors "in the same manner as is provided for state officers"); Okla. Const. art. 6, § 5 (person having the highest number of votes is elected for state elective office).

available on Oklahoma's ballot in general presidential election and to associate for political purposes.

Against such an injury to Plaintiffs' First and Fourteenth Amendment rights of slight or illusory character and magnitude, the Court balances Oklahoma's interests in preventing or discouraging unrestrained factionalism in the general election so as to focus interest on major issues and candidates; reduction of the risk of spending funds to count votes for fictitious candidates or those unwilling to hold public office and the encouragement of discussion of issues and candidates for a substantial period of time before the general election. These interests of the State of Oklahoma are of lesser importance in the context of national elections, *see Anderson v. Celebrezze*, 460 U.S. at 795, 103 S.Ct. at ___, 75 L.Ed.2d at 561-62, now under consideration by this Court. Moreover, the extent to which certain of the State of Oklahoma's interests makes it necessary to burden Plaintiffs' voting and associational rights in national elections is also less than the extent to which those very same interests would make it necessary to burden Plaintiffs' rights in state and local elections by a prohibition on write-in votes. This is because national media, national political organizations and parties and political parties recognized in other states may promote or achieve the interests Oklahoma advances as justification for its write-in voting ban in national elections. Nevertheless, Oklahoma advances several important state interests as justifications for its disallowance of write-in votes.

Because all of Oklahoma's electoral votes are cast for the Presidential and Vice-Presidential candidates who

receive a plurality of the votes, Oklahoma has a significant interest in discouraging "unrestrained factionalism" *Burdick v. Takushi,* 504 U.S. at ___, 112 S.Ct. at ___, 119 L.Ed.2d at 257, *quoting Munro v. Socialist Workers Party,* 479 U.S. 187, 196, 107 S.Ct. 533, ___ 93 L.Ed.2d 499, 507 (1986), *within the state* with respect to presidential elections so as to focus attention on major issues and candidates and so that Oklahoma's electoral votes will to as great an extent as possible reflect the popular will. Except to the extent that Oklahoma could by statute change the manner in which Presidential electors are elected, this interest weighs in favor of prohibiting write-in voting. Oklahoma also has a substantial, legitimate interest in preventing the expenditure of public funds to count votes for fictitious candidates and candidates who are not qualified or unwilling to serve. The costs of counting write-in votes only in general presidential elections would not appear to be prohibitive. *See* Affidavit of Lance Ward, Secretary of the Oklahoma State Election Board (Exhibit "B" to Brief in Support of Defendants' Motion for Summary Judgment and in Support of Defendants' Objection to Plaintiffs' Motion for Summary Judgment) at ¶¶ 3-6. However, Plaintiffs have not suggested any manner by which Oklahoma could allow write-in voting in the general presidential election and avoid expending funds to count ballots for fictitious candidates and/or electors or those unwilling or unqualified to serve. Finally, the State of Oklahoma has an interest in promoting education of its voters so that its electoral votes will to as great an extent as possible reflect an informed and educated popular will. The prohibition on write-in voting serves that interest by ensuring that candidates place themselves on the

ballot in time to allow the electorate an opportunity to examine the candidates' positions and qualifications. The extent to which the prohibition on write-in voting is necessary to ensure ample opportunity for voter education and that voters' choices are informed choices is ameliorated somewhat by national sources of information about candidates, but such sources may be lacking or inadequate with respect to purely local candidates.

The Court concludes that Oklahoma's interests advanced as justification for the write-in voting ban in presidential elections outweigh any slight or illusory injury to the constitutional rights Plaintiffs seek to vindicate herein.

In conclusion, Oklahoma's statutory prohibition on write-in voting, Okla. Stat. tit. 26, § 7-127(1), as applied to presidential elections is, in light of adequate ballot access afforded under other applicable Oklahoma election laws, Okla. Stat. tit. 26, § 1-108(2); Okla. Stat. tit. 26, § 10-101(1); Okla. Stat. tit. 26, § 10-101.1(1); & Okla. Stat. tit. 26, § 10-101.2(1), constitutional under the First and Fourteenth Amendments to the United States Constitution. Accordingly, Plaintiffs' motion for summary judgment is **DENIED** and Defendants' motion for summary judgment is **GRANTED.**

IT IS SO ORDERED this 26th day of March, 1993.

/s/ David L. Russell
DAVID L. RUSSELL
UNITED STATES DISTRICT JUDGE

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